

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PHILLIP GARRETT HUMPHREY,

Plaintiff,

v.

CAROLYN W. COLVIN¹, Acting
Commissioner of Social
Security,

Defendant.

No. CV-11-0350-JPH

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 20, 23. Attorney Jeffrey K. Finer represents plaintiff. Special Assistant United States Attorney Franco L. Becia represents defendant. The parties have consented to proceed before a magistrate judge. ECF No. 10. After reviewing the administrative record and the briefs filed by the parties, the court **grants** defendant's motion for summary judgment, ECF No. 23.

JURISDICTION

Humphrey applied for disability insurance benefits (DIB) on November 19, 2008. He alleged disability as of January 17, 2008 due to fractured ribs, ruptured spleen, ruptured sciatic nerve,

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Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

1 cardiovascular disease² and back problems (Tr. 110-113, 126). The
2 application was denied initially and on reconsideration (Tr. 66-
3 68, 70-71).

4 Administrative Law Judge (ALJ) James W. Sherry held a hearing
5 on April 13, 2010 (Tr. 26-63) and issued an unfavorable decision
6 on May 13, 2010 (Tr. 11-20). The Appeals Council denied review on
7 August 25, 2011 (Tr. 1-3). The ALJ's decision became the final
8 decision of the Commissioner appealable to the district court
9 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for
10 judicial review on September 23, 2011. ECF Nos. 1, 4.

11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing
13 transcript, the ALJ's decision, and the briefs of the parties.
14 They are only briefly summarized here.

15 Humphrey was 61 years old at the hearing. He lives with his
16 former spouse and companion of 18 years. He completed high school
17 and "attended a few years of Bible school." He has worked in the
18 printing industry and as a medical transcriptionist (Tr. 15, 29-
19 30, 35). In January 2008, following an altercation with police,
20 Humphrey sustained broken ribs and had an emergency splenectomy.
21 He served 90 days in jail for assaulting a police officer (Tr. 41-
22 42, 134). In June 2008, he was arrested for violating a no contact
23 order. Humphrey alleges he was assaulted following this arrest
24 (Tr. 43-45, 134).

25 At the hearing Humphrey testified he was working part-time,
26

27
28 ²Treatment for coronary artery disease is noted in 2005 and
2006. In 2007 Humphrey had no complaints of chest pain or other
cardiac related symptoms (Tr. 220-221).

1 20 hours per week and receiving partial unemployment benefits (Tr.
2 13, 31-32). He can no longer work as a medical transcriptionist
3 due to back pain and right leg pain and weakness (Tr. 15-16, 39-
4 40, 45, 49). He can sit for about an hour, stand for 30 minutes
5 and stand and/or walk for four hours out of eight. He can walk one
6 block (Tr. 16, 53-55).

7 SEQUENTIAL EVALUATION PROCESS

8 The Social Security Act (the Act) defines disability as the
9 "inability to engage in any substantial gainful activity by reason
10 of any medically determinable physical or mental impairment which
11 can be expected to result in death or which has lasted or can be
12 expected to last for a continuous period of not less than twelve
13 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
14 provides that a plaintiff shall be determined to be under a
15 disability only if any impairments are of such severity that a
16 plaintiff is not only unable to do previous work but cannot,
17 considering plaintiff's age, education and work experiences,
18 engage in any other substantial gainful work which exists in the
19 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
20 Thus, the definition of disability consists of both medical and
21 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
22 (9th Cir. 2001).

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a person is disabled.
25 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
26 is engaged in substantial gainful activities. If so, benefits are
27 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
28 the decision maker proceeds to step two, which determines whether

1 plaintiff has a medically severe impairment or combination of
2 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

3 If plaintiff does not have a severe impairment or combination
4 of impairments, the disability claim is denied. If the impairment
5 is severe, the evaluation proceeds to the third step, which
6 compares plaintiff's impairment with a number of listed
7 impairments acknowledged by the Commissioner to be so severe as to
8 preclude substantial gainful activity. 20 C.F.R. §§
9 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
10 App. 1. If the impairment meets or equals one of the listed
11 impairments, plaintiff is conclusively presumed to be disabled.
12 If the impairment is not one conclusively presumed to be
13 disabling, the evaluation proceeds to the fourth step, which
14 determines whether the impairment prevents plaintiff from
15 performing work which was performed in the past. If a plaintiff is
16 able to perform previous work, that plaintiff is deemed not
17 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
18 this step, plaintiff's residual functional capacity (RFC) is
19 considered. If plaintiff cannot perform past relevant work, the
20 fifth and final step in the process determines whether plaintiff
21 is able to perform other work in the national economy in view of
22 plaintiff's residual functional capacity, age, education and past
23 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);
24 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

25 The initial burden of proof rests upon plaintiff to establish
26 a *prima facie* case of entitlement to disability benefits.
27 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
28 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is

1 met once plaintiff establishes that a physical or mental
2 impairment prevents the performance of previous work. The burden
3 then shifts, at step five, to the Commissioner to show that (1)
4 plaintiff can perform other substantial gainful activity and (2) a
5 "significant number of jobs exist in the national economy" which
6 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
7 Cir. 1984).

8 STANDARD OF REVIEW

9 Congress has provided a limited scope of judicial review of a
10 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
11 the Commissioner's decision, made through an ALJ, when the
12 determination is not based on legal error and is supported by
13 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
14 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
15 "The [Commissioner's] determination that a plaintiff is not
16 disabled will be upheld if the findings of fact are supported by
17 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
18 Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence is
19 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
20 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
21 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989).
22 Substantial evidence "means such evidence as a reasonable mind
23 might accept as adequate to support a conclusion." *Richardson v.*
24 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch
25 inferences and conclusions as the [Commissioner] may reasonably
26 draw from the evidence" will also be upheld. *Mark v. Celebrezze*,
27 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers
28 the record as a whole, not just the evidence supporting the

1 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22
2 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th
3 Cir. 1980)).

4 It is the role of the trier of fact, not this Court, to
5 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
6 evidence supports more than one rational interpretation, the Court
7 may not substitute its judgment for that of the Commissioner.
8 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
9 (9th Cir. 1984). Nevertheless, a decision supported by substantial
10 evidence will still be set aside if the proper legal standards
11 were not applied in weighing the evidence and making the decision.
12 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
13 433 (9th Cir. 1987). Thus, if there is substantial evidence to
14 support the administrative findings, or if there is conflicting
15 evidence that will support a finding of either disability or
16 nondisability, the finding of the Commissioner is conclusive.
17 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

18 **ALJ'S FINDINGS**

19 ALJ Sherry determined Humphrey was insured through December
20 31, 2013 (Tr. 11, 13). At step one, the ALJ found Humphrey's work
21 after onset was less than substantial gainful activity (Tr. 13).
22 At steps two and three, the ALJ found Humphrey suffers from
23 coronary artery disease, diabetes mellitus, hypertension,
24 hyperlipidemia, lumbar degenerative disc disease with
25 radiculopathy, status post splenectomy and status post left rib
26 fracture, impairments that are severe but do not meet or medically
27 equal a Listed impairment (Tr. 13-14). He found Humphrey can
28 perform a wide range of light work (Tr. 15).

1 With respect to credibility, the ALJ found Humphrey's
2 medically determinable impairments could reasonably be expected to
3 cause the alleged symptoms; however, his statements concerning the
4 intensity, persistence and limiting effects of these symptoms are
5 not credible to the extent that they are inconsistent with the
6 ALJ's RFC assessment (Tr. 16). At step four, relying on a
7 vocational expert, the ALJ found Humphrey is capable of performing
8 his past work as a transcribing machine operator (Tr. 19, 58). The
9 ALJ concluded plaintiff was not disabled from January 17, 2008,
10 through May 13, 2010, the date of his decision (Tr. 20).

11 ISSUES

12 Humphrey alleges the ALJ's credibility assessment is flawed.
13 ECF No. 21 at 1. The Commissioner responds that the ALJ gave clear
14 and convincing reasons supported by substantial evidence in
15 support of his credibility finding, and asks the court to affirm
16 ECF No. 24 at 8-9, 18.

17 DISCUSSION

18 Humphrey alleges the ALJ erroneously rejected his testimony
19 as not fully credible.

20 It is the province of the ALJ to make credibility
21 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
22 1995). However, the ALJ's findings must be supported by specific
23 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
24 1990). Once the claimant produces medical evidence of an
25 underlying medical impairment, the ALJ may not discredit testimony
26 as to the severity of an impairment because it is unsupported by
27 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
28 1998). Absent affirmative evidence of malingering, the ALJ's

1 reasons for rejecting the claimant's testimony must be "clear and
2 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
3 "General findings are insufficient: rather the ALJ must identify
4 what testimony is not credible and what evidence undermines the
5 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
6 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

7 The ALJ found plaintiff's medically determinable impairments
8 could reasonably be expected to cause the alleged symptoms, but
9 found Humphrey's statements concerning the intensity, persistence
10 and limiting effects of the symptoms were not credible to the
11 extent they were inconsistent with the ALJ's RFC assessment for
12 light work.

13 The ALJ concluded Humphrey's allegations regarding his
14 condition are inconsistent with (1) the medical evidence, (2) his
15 limitations reported elsewhere, (3) his daily activities, and (4)
16 his lack of treatment and prescribed medication (Tr. 16-19).

17 With respect to reason (4), Humphrey alleges the ALJ
18 improperly used SSR 82-59 when he relied on the lack of treatment
19 and lack of prescribed medication as diminishing credibility.
20 Humphrey alleges because he has no medical insurance, he has been
21 unable to afford testing. He alleges the ALJ mischaracterizes this
22 as refusing to follow prescribed treatment. ECF No. 21 at 4-7.

23 Humphrey's interpretation of SSR 82-59 and of the ALJ's
24 reasoning is incorrect.

25 *SSR 82-59*

26 Noncompliance with medical care or unexplained or
27 inadequately explained reasons for failing to seek medical
28 treatment can cast doubt on a claimant's subjective complaints. 20

1 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.2d 597, 603 (9th
2 Cir. 1989). SSR 82-59 delineates the circumstances in which the
3 Commissioner can deny benefits on the basis that the claimant has
4 failed to follow prescribed treatment. *See* 20 C.F.R. § 416.930;
5 *Roberts v. Shalala*, 66 F.3d 179, 183 (9th Cir. 1995).

6 The procedures the Ruling mandates (including an opportunity
7 for claimant to explain why treatment has not been followed and
8 contacting the treating physician) apply only to claimants who
9 would otherwise be found disabled. *See Roberts*, 66 F.3d at 183.
10 As in *Roberts*, ALJ Sherry did not did not premise denial of
11 Humphrey's benefits solely on unexplained or inadequately
12 explained reasons for failing to seek or follow medical treatment,
13 as noted. Humphrey is therefore not entitled to these protections.

14 Even if we assume for the sake of argument the ALJ erred in
15 relying on these reasons, any error is harmless because the ALJ's
16 remaining reasoning and ultimate credibility determination are
17 adequately supported by substantial evidence, *see Carmickle v.*
18 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008),
19 as discussed below.

20 *Testimony inconsistent with the medical evidence*

21 The ALJ indicates the medical evidence does not support
22 Humphrey's allegation he suffers extreme limitations and is unable
23 to sustain full time work. The ALJ is correct. After an
24 examination in February 2009, A. Peter Weir, M.D., found Humphrey
25 has no work-related restrictions. Despite claims of left arm and
26 leg weakness, strength was normal in all extremities (Tr. 13, 16,
27 18, 301-03). Although lack of medical evidence cannot form the
28 sole basis for discounting pain testimony, it is a factor that the

1 ALJ can consider in his credibility analysis. *Burch v. Barnhart*,
2 400 F.3d 676, 680 (9th Cir. 2005). Moreover, the ALJ notes no
3 treating doctor has opined Humphrey is unable to work.

4 *Reports of limitations inconsistent with testimony*

5 Humphrey testified he needs a whole day off after he works
6 five hours (Tr. 33). He also testified he needs a day off after
7 working a five hour day for four days consecutively (Tr. 48). In
8 December 2008 Humphrey reported he worked two seven hour days in a
9 row, followed by a four hour day (Tr. 153). As the ALJ notes,
10 there is nothing in the record to suggest Humphrey's condition
11 worsened after 2008 to account for the apparent difference in
12 stamina levels. In the same December 2008 report, the ALJ notes
13 Humphrey stated he lived alone, attended a weekly two hour alcohol
14 class, cooked easy meals, ironed, cleaned, shopped, vacuumed,
15 read, drove, used public transportation and was able to lift 20
16 pounds (Tr. 16, 153, 155-58). He testified he is only able to lift
17 eight pounds (Tr. 53).

18 *Daily activities*

19 Humphrey's daily activities are not consistent with allegedly
20 disabling limitations. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
21 1989) (it is well-established that the nature of daily activities
22 may be considered when evaluating credibility).

23 As indicated activities include cooking, vacuuming, driving,
24 shopping, using the computer, working part-time and reading. In
25 2009 Humphrey told Dr. Weir his hobbies are fishing and playing
26 bass guitar (Tr. 13, 16, 18, 301-03).

27 No physician has opined Humphrey is unable to work. Before
28 onset, in March 2007, treating doctor Rita Snow, M.D., notes

1 Humphrey "has been feeling reasonably well" (Tr. 272). The
2 ALJ observes a treatment note in October 2008 [after onset]
3 indicates Humphrey appears to be doing well and walks 30 minutes a
4 day (Tr. 17, 19, 266-67), although Humphrey testified he can walk
5 one block (Tr. 55).

6 After reviewing the record, the undersigned finds the ALJ's
7 reasons for discounting Humphrey's credibility clear, convincing,
8 and fully supported by the record. Accordingly, the ALJ did not
9 err by concluding that plaintiff's subjective complaints regarding
10 the extent of his functional limitations were not fully credible.

11 **CONCLUSION**

12 Having reviewed the record and the ALJ's conclusions, this
13 court finds the ALJ's decision is free of legal error and
14 supported by substantial evidence. Accordingly,

15 **IT IS ORDERED:**

16 1. Defendant's motion for summary judgment, **ECF No. 23**, is
17 **GRANTED**.

18 2. Plaintiff's motion for summary judgment, **ECF No. 20**, is
19 **DENIED**.

20 **IT IS SO ORDERED.** The District Court Executive is directed to
21 file this Order, provide copies to the parties, enter judgment in
22 favor of defendant, and **CLOSE** the file.

23 **DATED** this 8th day of March, 2013

24
25 S/ James P. Hutton
JAMES P. HUTTON
26 UNITED STATES MAGISTRATE JUDGE
27
28